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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC,
fka CREDIT SUISSE FIRST BOSTON LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENTS

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
ANDREW D. BING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020

RICHARD E. GRIMM
Director of Enforcement
Antitrust Bureau

SARAH M. HUBBARD
Assistant Attorney General
Antitrust Bureau

* *Counsel of Record*

Counsel for Amicus Curiae
State of New York

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INTEREST OF THE AMICUS CURIAE

New York City is a global commercial center and home to major securities markets. The State of New York and the New York Attorney General have a strong interest in the orderly functioning of the markets that are essential to the State's financial well-being. In this connection, New York has a particular interest in the enforcement of both the antitrust laws that protect and promote competition and the securities laws that protect the integrity of the securities market, and in the appropriate harmonization of both regulatory regimes.

The Attorney General is authorized to enforce the federal antitrust laws, both to redress violations that injure the State and its political subdivisions, and in his capacity as *parens patriae* on behalf of New York's citizens. 15 U.S.C. § 15c (2000); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972). The Attorney General is also the primary public enforcer of the State's own antitrust laws, which generally conform to federal law.[1] *See X.L.O. Concrete Corp. v. Rivergate Corp.*, 634 N.E. 2d 158, 161 (N.Y. 1994); *see generally California v. ARC America Corp.*, 490 U.S. 93, 101-03 (1989) (Congress accords special deference to state antitrust laws, which are not preempted even by inconsistent federal antitrust principles). The blanket antitrust immunity that petitioners urge for initial public offering ("IPO") transactions would compromise the Attorney General's ability to redress harms suffered by public and private investors, businesses and the State.

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1. The Attorney General represents the state and acts "in the name and in behalf of the people" in antitrust actions to secure injunctive relief and civil penalties, N.Y. Gen. Bus. Law §§ 342, 342-a (McKinney 2004), and has broad investigatory powers and exclusive authority to bring state criminal antitrust actions. *Id.*, §§ 343, 347.

New York's Attorney General also recognizes the importance of protecting the integrity of the securities regulatory system, and indeed he enforces New York's Martin Act, N.Y. Gen. Bus. Law § 352 (McKinney 1996), "which grants [the Attorney General] both regulatory and remedial powers aimed at detecting, preventing and stopping fraudulent securities practices." *Kralik v. 239 E. 79th St. Owners Corp.*, 832 N.E. 2d 707, 709 (N.Y. 2005). However, applying both the antitrust laws and securities law to the anticompetitive conduct alleged in this case would enhance rather than impair the effectiveness of the securities laws. The aftermarket price-boosting scheme alleged by plaintiffs is prohibited by both legal regimes. Thus, there is no conflict requiring the ouster of antitrust remedies.

SUMMARY OF ARGUMENT

This Court should affirm the Second Circuit's rejection of implied antitrust immunity here. There is no "convincing showing of clear repugnancy between antitrust laws and the [SEC's] regulatory system" in this case warranting an implied repeal of antitrust laws. *See National Gerimedical Hospital and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981). To the contrary, the conduct challenged as anticompetitive in this case has been consistently prohibited by both the antitrust laws and the SEC's regulatory scheme. As both the district court and the Second Circuit found, the gravamen of the Consolidated Amended Class Action Complaint ("Complaint") is petitioners' alleged conspiracy to inflate the aftermarket prices of IPO shares by imposing anticompetitive charges, as well as engaging in impermissible aftermarket "laddering" and "tie-in" arrangements. The SEC has never permitted these anticompetitive activities and lacks the statutory authority to do so. Indeed, the SEC's regulation specifically prohibits the very agreements alleged by respondents.

Moreover, there is no basis in law or reason for the blanket antitrust immunity that petitioners seek, and their arguments supporting immunity are not persuasive. First, immunity is not required by this Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Second, contrary to the suggestion of the United States as amicus curiae, the core conduct alleged here – conspiracy to manipulate IPO aftermarket prices – is not "inextricably intertwined" with collaborative activities that are otherwise authorized by the securities laws. Based on the faulty premise that it is, the United States proposes a heightened pleading standard that would permit securities industry participants to violate the antitrust laws with impunity as long as the violation occurs in connection with otherwise lawful conduct.

Third, if, as petitioners contend, the allegations in the Complaint are overbroad, that would not justify the blanket antitrust immunity they seek here. As the court of appeals concluded, the district court has ample tools available to assure that petitioners are not prejudiced by evidence of the lawful underwriter conduct that allegedly formed the backdrop for the conspiracy. Alternatively, if this Court were to conclude that the district court cannot provide such assurance, the appropriate remedy would not be to immunize the entire IPO aftermarket process from antitrust scrutiny. Instead, the remedy would be to remand the case with directions to the district court to remove from the Complaint any suggestion that respondents are alleging that collaborative activities authorized under the securities laws are illegal under the antitrust laws, and to permit respondents to clarify that these activities merely formed the backdrop for the alleged unlawful aftermarket price-boosting schemes. A blanket immunity from the antitrust laws would be an overbroad remedy for any concern about the possible abuse of private treble damage actions, because it would unnecessarily and inappropriately impair the State's power to protect its citizens from anticompetitive conduct.

Finally, petitioners are mistaken in suggesting that the Second Circuit's decision, which preserves the legal standard that has been in place since Congress adopted the Sherman Act in 1890, poses a new threat to this country's capital markets. The court's denial of implied antitrust immunity is not new, but instead is supported by both reason and long-standing precedent. Moreover, if there has been any decline in the vitality of this country's capital markets, petitioners have made no showing that it is attributable to the availability of antitrust remedies. Congress, not the courts, is the proper forum for petitioners' unfounded claim that all IPO-related conduct should be immunized from the antitrust laws in order to preserve the primacy of the United States capital markets.

ARGUMENT

I. IMPLIED ANTITRUST IMMUNITY IS INAPPROPRIATE IN THIS CASE BECAUSE THERE IS NO "CLEAR REPUGNANCY" BETWEEN THE ANTITRUST LAWS AND THE SEC'S REGULATORY SCHEME

A. The "Clear Repugnancy" Standard Requires Actual Or Potential Conflict Between Antitrust Law and the Regulatory Regime.

This Court has held that "[t]he Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and it is a cardinal principle of construction that repeals by implication are not favored." *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963) (citations and internal quotations omitted). Because "[i]mplied antitrust immunity is not favored," it can be justified "only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719 (1975) (*"NASD"*); *accord National Gerimedical Hospital*, 452 U.S. at 388. Even

where the required clear repugnancy is found, repeal "is to be regarded as implied . . . only to the minimum extent necessary." *Silver*, 373 U.S. at 357. Thus, "the proper approach" is one that, where possible, "reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.*

Accordingly, mere overlap between the antitrust laws and a regulatory scheme is insufficient to imply antitrust repeal. *See NASD*, 422 U.S. at 734 (immunity has been implied "in particular and discrete instances"). Although this Court has weighed "the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws," *see Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 688 (1975), it has never relied on that ground alone to create blanket antitrust immunity for regulated industries. *Cf. Silver*, 373 U.S. at 360-61 ("the statutory scheme of the [Securities Exchange Act] is not sufficiently pervasive to create a total exemption from the antitrust laws"). "Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry." *National Gerimedical Hospital*, 452 U.S. at 389 (citations omitted).[2]

The "clear repugnancy" required for implied repeal can result only from an "actual" or "potential" conflict between the two bodies of law. A conflict that supports a finding of

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2. As leading antitrust commentators state, the preferred view "leads to a particularized inquiry into the intensity and nature of agency scrutiny over the challenged practice. It avoids finding broad areas of immunity or repeal and concentrates instead on an independent appraisal of the necessity or reasonableness of the challenged conduct." Philip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 243d at 319 (3d ed. 2006) ("*Antitrust Law*"); *see also ABA Antitrust Law Developments* 1240 (5th ed. 2002) ("The implication of repeal will be limited to the activity challenged and will not extend to other conduct regulated by the same agency.").

implied antitrust repeal may arise when the antitrust laws would bar an action that the regulatory scheme permits, or the regulatory agency has jurisdiction over the challenged conduct but has deliberately chosen not to regulate it or the agency has the authority to permit, and has in fact permitted in the past, conduct that it currently prohibits. *See Gordon*, 422 U.S. at 690-91; *see also National Gerimedical Hospital*, 452 U.S. at 389 ("[i]ntent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge"); *NASD*, 422 U.S. at 722 (immunity found because there is "no way to reconcile the Commission's power to authorize [the challenged] restrictions with the competing mandate of the antitrust laws"). Accordingly, where both the antitrust laws and the regulatory scheme consistently prohibit the challenged conduct, antitrust immunity is inappropriate.

B. No Actual or Potential Conflict Exists Because the Alleged Price-Boosting Scheme Is Prohibited by the Securities Laws, and the SEC Has No Power to Permit It.

1. No actual conflict prevents the application of the antitrust laws to the alleged scheme.

There can be no "clear repugnancy" in this case because there is no conflict between antitrust enforcement and securities regulation. Respondents here allege that petitioners colluded to inflate the prices of securities in the IPO aftermarket. The anticompetitive practices alleged include a conspiracy to impose on IPO customers "consideration in addition to the underwriters' discount;" additional, unauthorized charges; and obligations to make follow-up stock purchases (Compl. at ¶¶ 1, 4, 6). Petitioners allegedly agreed "to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and

significantly inflate the after-market prices of IPOs – a practice known as 'laddering'" (*id.* ¶¶ 4, 7). The Complaint also alleges that petitioners "abused the preexisting practice of combining into underwriting syndicates by implementing the unlawful agreement alleged . . . through such syndicates" (*id.* ¶ 5). Respondents were allegedly injured by paying "the anticompetitive charges and inflated aftermarket prices," (*id.* ¶ 9)– which averaged 60 percent over the issue price on just the first trading day (*id.* ¶ 8).

Liberally construed, the Complaint charges either upward price-fixing or, at least, horizontal and vertical collusion involving securities industry competitors that had the purpose and effect of raising open-market prices. The SEC has consistently prohibited such price-boosting schemes. SEC's Regulation M, 17 C.F.R. Part 242, prohibits "the very tie-in, laddering and other aftermarket agreements alleged by the Sherman Act Plaintiffs." *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497, 515 (S.D.N.Y. 2003) ("*In re IPO*"), *vacated and remanded sub. nom. Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005) ("*Billing*").[3] In fact, the SEC has had a "consistent [negative] view of this conduct" since at least 1961 – more than 40 years. *Id.* SEC Bulletin 10, "Prohibited Solicitations and 'Tie-in' Agreements for Aftermarket Purchases," makes clear that the SEC considers tying IPO allocations to later open-market purchases as an "egregious" form of solicitation, and that this conduct may also violate the anti-manipulation provisions of the Exchange Act, former Rule 10(b)(6) and other laws. SEC Div. of Market Regulation, Staff Legal Bulletin No. 10: *Prohibited Solicitations and "Tie-in"*

3. Regulation M, the district court noted, prohibits aftermarket stabilization, except in certain circumstances "for the purpose of preventing or retarding a decline in the market price." *In re IPO*, 287 F. Supp. 2d at 515. In this case, by contrast, the alleged scheme was not designed to promote stability, but rather was pursued to artificially increase prices.

Agreements for Aftermarket Purchases ¶ 2 (Aug. 25, 2000). Similarly, the SEC noted in a 1984 report that "[the practice of tie-in agreements and laddering] violates the anti-fraud and anti-manipulative provisions of the federal securities laws." Report Of The Securities and Exchange Commission Concerning The Hot Issues Markets, quoted in *Billing*, 426 F.3d at 143.

Indeed, the securities statutes themselves prohibit the blatant upward price manipulation alleged here. The alleged laddering and other related price-boosting conduct fall within the prohibitions of Section 17 of the Securities Act, 15 U.S.C. § 77q (2000) ("Fraudulent Interstate Transactions"), Sections 9(a)(1) - (5) of the Exchange Act, 15 U.S.C. § 78i(a)(1)-(5) (2000) ("Manipulation of Security Prices") and Section 15(c)(1) of the Exchange Act, 15 U.S.C. § 78o(c)(1) (2000) ("Use of Manipulative or Deceptive Devices; Contravention of Rules and Regulations"). For example, the SEC has found that Section 17 of the Securities Act prohibits an underwriter from requiring laddering or tie-ins or from manipulating prices above the IPO prices. *See, e.g., In the Matter of The Stuart James Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 85,129 at 84,089 (March 17, 1993); *see also In the Matter of Robert Francis Catoggio*, 60 S.E.C. Docket 630, 1995 WL 560217 (Sept. 21, 1995) (manipulation of aftermarket prices constituted violations of Section 17(a) of the Securities Act and Section 15(c)(1) of the Exchange Act). Similarly, Sections 9(a)(1) - (5) of the Exchange Act specifically forbid manipulation and do not provide for SEC rulemaking; that is, these sections prohibit outright conspiracies to raise IPO prices.

Consequently, the SEC is not authorized to permit open-market price-boosting conspiracies. Although Section 9(a)(6) of the Exchange Act, 15 U.S.C. § 78i(a)(6) (2000), gives the SEC rulemaking powers to permit conduct designed to stabilize the price of a security, and although SEC Regulation M permits aftermarket price stabilization "for the purpose

of preventing or retarding a decline in the market price," the rulemaking power does not extend to conduct designed to increase prices rather than retard their decline. *See In re IPO*, 287 F. Supp. 2d at 515.

Because SEC authorizing statutes and regulations prohibit the alleged anticompetitive practices — indeed, petitioners and the United States have not pointed to any statute or regulation suggesting the contrary – applying the antitrust laws would not be "clearly repugnant" to the SEC's regulatory scheme. *National Gerimedical Hospital*, 452 U.S. at 388; *see also Antitrust Law* ¶ 243e3 at 335 ("Clearly no 'repugnancy' exists between a regulatory regime and antitrust policy where enforcing the latter would support the former").[4] Implied antitrust immunity is therefore inappropriate in this case.

2. There is no potential conflict between the antitrust laws and the SEC's regulation of the IPO process.

This Court has no reason to adopt the position of the district court below, which found implied immunity by reason of the SEC's "pervasive" authority over the IPO process. Pet Br. at 32-33. According to the district court, "it is clear that the SEC, both directly and through its pervasive oversight of the NASD and other [self regulatory organizations], either expressly permits the conduct alleged in the . . . Complaint

4. Neither Section 28 of the Securities Act, which permits the SEC to exempt by rule or regulation "any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of [the Securities Act]," 15 U.S.C. § 77z-3 (2000), nor the exemptive provision in Section 36 of the Exchange Act, 15 U.S.C. § 78mm (2000), in any way gives the SEC the authority to permit across-the-board collusive price-boosting schemes that are clearly prohibited by the anti-fraud and anti-manipulation provisions of the securities laws. Moreover, even if the SEC had such authority, there is little likelihood that it would ever exercise it to authorize the conduct alleged here.

or has the power to regulate the conduct." *In re IPO*, 287 F. Supp. 2d at 523. Indeed, the district court devoted much attention to describing the "pervasive" aspects of the SEC's IPO regulation, the SEC's power to regulate IPOs, and the legality of the syndicate system. It found that if certain permitted practices, such as underwriting syndicates, road shows, syndicate member communications about securities purchases, collection of buyer indications of interest, and market-making activity, were subject to antitrust challenge, then there would be a "plain repugnancy" between the two bodies of law. *Id.* at 506-10.

But respondents are not claiming that underwriting syndicates or any other of these practices is illegal. As the district court itself found, the "gravamen" of the Complaint is defendants' alleged conspiracy to inflate the aftermarket prices through impermissible aftermarket laddering, tie-in and other arrangements. *Id.* at 499; *see also Billing*, 426 F.3d at 146 (identifying the legitimate activities alleged in the complaint, like the use of syndicates and the road show process, as "background conduct"). Unlike the lawful IPO practices described above, open market upward price manipulation practices are, and have always been, prohibited.

That the challenged laddering practices occurred in connection with IPO activities that are themselves pervasively regulated does not require immunity. A regulatory scheme's pervasiveness does not by itself create a "plain repugnancy" between the regulatory scheme and the antitrust laws. *See Antitrust Law* ¶ 243e2 at 326 (a regulatory scheme's "pervasiveness" "in the abstract is minimally relevant and never dispositive"). This Court's holding in *NASD* demonstrates this point. As the court of appeals explained below, this Court's grant of immunity for the alleged horizontal restraints in *NASD* on the ground of "pervasive regulation" was derivative. *Billing*, 426 F.3d at 161. The Court first determined that the underlying vertical restraints

imposed by the horizontal agreements were immune from the antitrust laws because they had been "consistently approved by the SEC." *Id.* at 161, citing *NASD*, 422 U.S. at 733. The "plain repugnancy" standard was satisfied because "[t]he purpose of the challenged conspiracy actually coincided with the aims of the SEC." *Billing*, 426 F.3d at 161. Thus, "after the Court determined that the underlying restraints on the secondary market were immune it could then conclude that conduct enforcing those restraints was also immune." *Id.* Accordingly, *NASD* did not hold that antitrust immunity applies to all anticompetitive conduct in the pervasively regulated securities industry even where there is no conflict between the antitrust laws and the regulatory regime.

Here, the SEC has no statutory authority to approve the open-market price-boosting schemes challenged, and, given the pernicious nature of the practices, Congress is unlikely to give it the authority to do so. Indeed, neither the amicus briefs filed below in this matter nor the amicus brief of the United States here claims that the SEC has the authority to permit the collusive price-boosting conduct alleged here. Thus, there is simply no possibility that the two bodies of law would conflict as to this alleged conduct. There is no need to replace the antitrust laws in order to make the securities regulatory system work. *See Gordon*, 422 U.S. at 690-91 (antitrust immunity found regarding fixing of commission rates; although the practice was actually prohibited by both the securities laws and antitrust laws by the time the case was heard, the SEC had the statutory authority to permit the conduct in the future should it choose to do so). In contrast, in this case there is no statutory or regulatory authority, legislative history, or past regulatory activity indicating that aftermarket price-fixing conspiracies might be permitted by the SEC in the future.

II. THERE IS NO BASIS IN LAW OR REASON FOR THE BLANKET ANTITRUST IMMUNITY PETITIONERS SEEK

A. This Court's Decision in *Trinko* Does Not Support Implied Immunity Here.

Quoting this Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), petitioners argue for a broad antitrust immunity because "when 'a regulatory structure designed to deter and remedy anticompetitive harm,' such as the securities laws, is in place, 'the additional benefit to competition provided by antitrust enforcement' is 'small.'" Pet. Br. at 27 (quoting *Trinko*, 540 U.S. at 412). Petitioners' out-of-context quotations from *Trinko* do not support a finding of implied immunity here.

In *Trinko*, plaintiffs asserted a claim under section 2 of the Sherman Act, 15 U.S.C. § 2 (Supp. IV 2004), based on Verizon's alleged refusal to aid local phone service competitors by sharing its facilities with them, as required by the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. *See Trinko*, 540 U.S. at 401. Importantly, the case did not involve implied immunity, because Congress had expressly preserved the application of the antitrust laws in the 1996 Act. *See id.* at 405-07. Instead, the question before the Court in *Trinko* was whether Verizon's failure to comply with the 1996 Act's mandate that it share facilities with competitors also violated the antitrust laws. *See id.* at 407.

In finding no antitrust violation, the Court explained that there is generally no obligation under the antitrust laws to aid competitors and that the obligations imposed under the 1996 Act went beyond the antitrust law mandate. *See id.* at 408, 415. The Court observed that its decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), had recognized a limited exception to the no-duty-to-aid rule.

However, the Court distinguished the facts of *Aspen Skiing*, noting that there, defendant had terminated a prior course of dealing with plaintiff and refused to reinstate it even at retail rates, suggesting that the refusal to deal was intended to reduce competition. *Trinko*, 540 U.S. at 409.

The language in *Trinko* quoted by petitioners was part of the Court's explanation for its rejection of the argument that it should expand the reach of the Sherman Act by recognizing a new exception to the general rule that refusals to aid competitors do not violate the antitrust laws. The Court simply noted that the regulatory regime under the 1996 Act "was an effective steward of the antitrust function" because it already required Verizon to aid its local service competitors and provided effective inducements and enforcement mechanisms. *Trinko*, 540 U.S. at 413. But the question in *Trinko* — whether the Court should expand the antitrust laws to reach conduct that did not violate them — is far different from the question here, which is whether Congress impliedly exempted otherwise unlawful IPO aftermarket price-boosting conduct from antitrust scrutiny when it enacted the securities laws.

Trinko's teachings thus do not apply here. In *Trinko*, it was "less plausible that the antitrust laws contemplate . . . scrutiny" in addition to that provided by the regulatory scheme. *Id.* at 412. Here, in contrast, the alleged price-fixing conduct is a *per se* violation of the Sherman Act under well-established antitrust principles. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit"). Respondents are asking the Court to apply, not expand, the antitrust laws, and to reject petitioners' argument that *Trinko* allows competitors a free hand to fix prices as long as they do so in a heavily regulated industry.

B. The Core Conduct Alleged Here Is Not "Inextricably Intertwined" With Lawful Collaborative Activities And There Is No Basis For The Pleading Standard Proposed By The United States.

1. The pleading standard proposed by the United States is unwarranted.

In its amicus brief, the United States proposes a vague antitrust immunity standard that does not address the core illegal conduct alleged here, that is inconsistent with this Court's implied immunity precedent, and that could, if expansively interpreted, effectively repeal the antitrust laws in the securities industry and other regulated industries. The United States proposes its new immunity standard because it fears that the threat of treble damages liability based on conduct "inextricably intertwined" with the collaborative activities authorized and regulated by the SEC under the securities laws will "vitiate the immunity for the authorized conduct and thus bring the antitrust laws into conflict with the regulatory scheme." U.S. Br. at 13.

This fear is groundless here. Respondents seek to impose antitrust liability based on allegations of tying, laddering, and other aftermarket price manipulation. These activities are not, and never have been, "inextricably intertwined" with authorized collaborative activities such as underwriting syndicates and road shows. Conspiracies to boost aftermarket prices are not inherent in the IPO syndicate system - even if they are devised at an underwriting meeting or a road show. This is not a case where the alleged illegal activities "cannot practicably be separated" from legal collaboration. *See* U.S. Br. at 15.

The United States mischaracterizes the alleged misconduct as inseparable from authorized collaborative activities, and as a result proposes a heightened pleading

standard that would exempt almost all anticompetitive conduct by securities industry participants from the antitrust laws:

> [Respondents] must allege facts providing concrete notice and giving rise to a reasonably grounded expectation that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such authorized activities.

U.S. Br. at 10. This proposed standard is defective in two respects. First, it rests on the mistaken assumption that the alleged activity in this case is inextricably intertwined with lawful activity. Second, whether or not that assumption is correct, there is no reason to bar all reference to lawful activity as part of the background to an antitrust offense. Such a standard would shield all anticompetitive conduct by underwriters occurring in connection with lawful syndicates, road shows, or other permitted activity. In determining whether antitrust immunity applies, the Court should focus on the "gravamen of the complaint" – here, illegal tying, laddering, and market manipulation – not on whether the context in which illegal activity was perpetrated is itself lawful.

In addition to being unduly vague and expansive, the novel standard urged by the United States is at odds with this Court's decision in *Silver*. That decision rejected a claim of implied immunity where the New York Stock Exchange instructed its members to discontinue private wire connections with Silver's broker-dealer firms without providing notice, a hearing, or any reason for the disconnections. *Silver*, 373 U.S. at 364. This Court acknowledged that the Exchange's self-regulation serves a crucial role in the economy, and that "[r]ules which regulate Exchange members' doing of business with nonmembers in

the over-the-counter market are . . . very much pertinent to the aims of self-regulation under the 1934 Act." *Id.* at 355. Although the Exchange was permitted under the regulatory scheme to instruct member firms to discontinue private wire connections with non-member broker-dealers, the Court held that the Exchange had exceeded the scope of its authority – and the reach of immunity – because it denied necessary procedural safeguards. *Id.* at 364-65. But under the standard proposed here by the United States, the antitrust offense could not have been "established without relying on activities that are authorized under the regulatory scheme." U.S. Br. At 10. Such a standard – unless so narrowly construed that it does not differ from existing law – is at odds not only with *Silver*, but also the entire body of implied immunity jurisprudence.

Finally, the proposed standard is not a necessary or proper remedy for the danger it is designed to meet. The United States speculates that a plaintiff might convince judges or juries to infer an antitrust conspiracy from general "discussions among underwriters in an IPO syndicate" that are permitted by the SEC. U.S. Br. at 15. But as the United States recognizes, the district court can "ensure that petitioners are not prejudiced by virtue of their legitimate conduct" by using its "broad discretion to tailor discovery narrowly and to dictate the sequence of discovery" and by limiting "any use of evidence of protected activity and exclude that evidence when . . . it is irrelevant or unduly prejudicial." U.S. Br. at 28-29 (quotations and internal citations omitted). *See also Billing*, 426 F.3d at 167 n. 47 ("[W]e leave to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities.") There is no need for this Court to divest trial courts of antitrust jurisdiction in order to guard against unwarranted inferences from authorized conduct.

2. The proper remedy for any overbroad allegations of authorized conduct is to remand with directions to correct the pleadings.

Petitioners and the United States urge implied immunity primarily to avoid the danger that antitrust liability might improperly be founded on the lawful conduct that forms the backdrop for the alleged illegal price-boosting scheme. The remedy does not fit the harm. Had respondents made explicit in the Complaint that they are not alleging that legal activity, like underwriting syndicates, is illegal under the antitrust laws, petitioners' arguments would lose nearly all of their force. Notwithstanding the wording of the Complaint, the courts below recognized that the core illegal conduct alleged is an aftermarket price boosting scheme. If this Court nevertheless concludes that the district court cannot protect petitioners from prejudice arising from respondents' contextual allegations of protected conduct, the Court should remand the case and direct respondents to delete from the Complaint any suggestion that authorized collaborative activity is illegal, and to clarify that such activity is described only as the backdrop against which the petitioners conspired to unlawfully boost prices in the post-IPO open market.[5]

In addition, the blanket antitrust immunity that petitioners assert is an overbroad remedy for any concern about private treble damage actions, because it would unnecessarily impair the State's ability to protect its citizens from anticompetitive behavior related to IPOs. In the Eleventh Amendment context, this Court has recognized an important difference between private suits and governmental suits. Like suits brought by the United States, "[s]uits brought

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5. If the issue here turns on the pleadings, petitioners' proper course is to challenge the pleadings' adequacy, as the defendants have done in *Bell Atl. Corp. v. Twombly*, No. 05-1126 (argued Nov. 27, 2006).

by the [States] require the exercise of political responsibility for each suit" while private suits do not. *Alden v. Maine*, 527 U.S. 706, 756 (1999). Governmental suits are "at the instance and under the control of responsible [government] officers" who are constrained to act in the interest of the people as a whole rather than in pursuit of a private interest. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991). Thus, the State has discretion not to sue when its responsible officers determine that a suit would be unwarranted or not in the State's interest. Unlike a private plaintiff, this Office would weigh, among other factors, the public's interest in the orderly functioning of the securities markets in deciding whether to pursue an antitrust claim such as this one. The Court should not construe the antitrust laws in a manner that destroys the State's authority in its *parens patriae* capacity to obtain redress for clear antitrust violations such as those alleged here.

C. Petitioners' Claim That Antitrust Immunity is Needed to Preserve U.S. Capital Markets Does Not Support Their Proposed Interpretation of the Antitrust Laws.

1. Congress is the proper forum for petitioners' policy arguments.

Petitioners urge the Court broadly to immunize the IPO process from the antitrust laws so as not to undermine capital formation in the United States. *See* Pet. Br. at 37-41. Petitioners assert that denying immunity "exacerbate[s] a growing trend of securities offerings shifting overseas." *Id.* at 21. This claim is properly addressed to Congress and not to this Court. Congress has the power to exempt the securities industry from the operation of antitrust laws in whole or in part, but it has not done so. *See Silver*, 373 U.S. at 357. Likewise, Congress and not this Court is the proper forum to address petitioners' expressed concern about private class actions seeking treble damages. Petitioners' proposal

for judicial rather than legislative relief would eliminate all antitrust enforcement, whether private or governmental, in the capital markets. Congress passed the antitrust laws to promote a free market and to foster a productive economy. It is up to Congress to decide whether and to what extent these goals may be outweighed by the need to preserve the IPO market from antitrust scrutiny.

2. The Second Circuit's decision does not represent a new threat to the capital markets.

Petitioners' concern that the Second Circuit's decision raises a new threat to the capital markets is unfounded. That court's application of the implied immunity doctrine did not break any new ground, but simply applied this Court's implied immunity precedents going back over four decades. The court relied on the "clear repugnancy" standard for implied immunity, noting that repeal of the antitrust laws will be implied

> only if the repeal is necessary to make the regulatory provisions work, *see Silver*, 373 U.S. at 357, "and even then only to the minimum extent necessary," *id. See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 145, 148.

Billing, 426 F.3d at 147. The court of appeals found, from the text of the statutes and its analysis of legislative intent, that there is no plain repugnancy between the antitrust and regulatory provisions here, that Congress did not intend on implied repeal of the antitrust laws, and that repeal is not necessary to make the regulatory provisions work. *Id.* at 169-70.

3. No evidence supports petitioners' claim that antitrust enforcement in the IPO context will undermine capital formation in the United States.

The suggestion that antitrust immunity is essential to the preservation of the American capital markets is wholly unsupported. SEC Commissioner Paul Atkins has written that litigation risks and burdensome regulations have caused a drastic decline in the number of new stock offerings occurring in the United States:

> In 2000, nine of every 10 dollars raised by non-U.S. companies through new stock offerings were raised in the U.S. Last year the reverse was true: nine of every 10 dollars were raised abroad.

Paul Atkins, *A Serious Threat To Our Capital Markets*, Wall Street Journal, June 10, 2006, at A12. He asserts that, if the decision below is permitted to stand, "[c]lass action suits based in antitrust law could be used to dismantle the system that has been developed over the years for getting IPOs efficiently and effectively to the market." *Id.*

These contentions have no evidentiary support. First, the Sherman Antitrust Act was enacted in 1890 and has been construed to apply to U.S. capital markets ever since. *See* Act of July 2, 1890, 26 Stat. 209. In denying immunity, the Second Circuit did not create a new threat to the capital markets, but instead followed its and this Court's decades-old precedent. Existing Second Circuit precedent demonstrates that the court has properly implied antitrust immunity in the securities context when the required "clear repugnancy" is present. *See, e.g., In re Stock Exchs. Options Trading Antitrust Litigation*, 317 F.3d 134 (2d Cir. 2003); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002); *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990). The antitrust laws cannot be blamed for a change

in the markets that occurred in only the last six years. Second, this class action does not aim to dismantle the system for getting IPOs to market. It does not aim to dismantle underwriting syndicates or other authorized collaborative activity. It aims only to dismantle aftermarket price-boosting, which the SEC has long recognized as illegal and which undermines the integrity of our capital markets. The antitrust laws have always applied to the kinds of anticompetitive conduct alleged here that are not permitted by securities regulations. Petitioners offer no proof that their continued application will "devastate America's process of capital formation." Atkins, *supra*.

Furthermore, while petitioners purport to oppose only private class actions, the sweeping doctrinal change they advocate would equally curtail the ability of governmental antitrust enforcers, including the Justice Department and the State Attorneys General, to protect investors and businesses from anticompetitive conduct in the securities industry. Finally, it is not at all clear that an implied repeal of the antitrust laws in the IPO context — laws which seek to preserve competition and a free market — would make the United States more attractive to businesses.

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
ANDREW D. BING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020

RICHARD E. GRIMM
Director of Enforcement
Antitrust Bureau

SARAH M. HUBBARD
Assistant Attorney General
Antitrust Bureau

* *Counsel of Record*

Counsel for Amicus Curiae
State of New York